INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
ARGUMENT	7
I. Appellants have evaded the true issue in this case	7
II. The Commission is not the proper forum for the adjudication of private contractual rights	11
(a) There is nothing in the legislative history of Section 5 (2-11) or of its prior enactments which support the interpretation placed on those provisions by Appellant	15
III. The Commission has consistently disclaimed authority in Section 5 proceedings to pass upon private disputes arising out of contracts, but has left those matters to settlement by the parties themselves or by the courts	20
IV. The decided cases confirm the Commission in its interpretation of its powers under Section 5 (2) in respect to the enforcement of private rights	22
V. Practical considerations deny the broad interpretation which appellants would give to Section 5 (2-11)	32
CONCLUSION	32

TABLE OF CASES

Berg v. Cincinnati, N. Y. C. Ry. Co., 56 F. Supp. 842 (E. D. Ky., 1944)	21
Carolina M. Exp. Lines—Lease and Purchase—Reed, (1946) 40 M. C. C. 405	20

771916—48——1

	Page
Claiborne-Annapolis Ferry Co. v. *U. S.*, 285 U. S. 382	23
Cleveland, C., C. & St. L. R. Co. v. *Jackson*, 22 F. (2d) 509	21
Cleveland, C., C. & St. L. R. Co. v. *U. S.*, 275 U. S. 404	23
Denver & St. L. Ry. Co.—Control, 252 I. C. C. 153	21
I. C. C. v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479	20
I. C. C. v. *Railway Labor Ass'n*, 315 U. S. 373	13
Jessup—Control—Safeway Trails, (1943) 39 M. C. C. 233	20
Lancaster Transp. Co.—Purchase—York—Buffalo M. Exp., (1944) 39 M. C. C. 579	20
Logan v. *Davis*, 233 U. S. 613	20
L. & N. R. Co. v. *U. S.* 282 U. S. 740	20
Missouri Pac. R. Co. v. *U. S.*, 4 F. Supp. 449 (D. C. E. D. Ky. 1933)	25
N. Y. Central Securities Corp. v. *U. S.*, 287 U. S. 12	23, 33
N. Y. Central Securities Corp. v. *U. S.*, 54 F. (2d) 122	24
N. Y. Central Unification, 150 I. C. C. 278	21
Nickel Plate Unification, 105 I. C. C. 425	21
Otis & Co. v. *Pennsylvania R. Co.*, 61 F. Supp. 905, (E. D. Pa., 1945)	21, 26, 28, 29, 30, 31
Pittsburgh & West. Va. R. Co. v. *U. S.*, 281 U. S. 479	23, 29
Raymond Bros.—Purchase—Bersel, (1938) 15 M. C. C. 477	20
St. Johns River Line—Purchase—Browne Motor Freight (1942) 38 M. C. C. 99	20
St. L. S. W. R. Co. Control, 180 I. C. C. 175	25
Sullivan—Purchase—Service Freight Line, Inc., (1942) 38 M. C. C. 621	20
Switchmen's Union v. *Mediation Board*, 135 F (2d) 785	20
Thompson v. *U. S.*, 246 U. S. 547	19
Unification of Southwestern Lines, 124 I. C. C. 401	21
U. S. v. *Pennsylvania R. Co.*, 242 U. S. 208	19–20
U. S. v. *Jackson*, 280 U. S. 183	20
Watson Bros. Transp. Co. v. *Jaffa*, 143 F. (2d) 340 (C. C. A. 8th, 1944)	26, 27, 28
Yellow Cab Transit Co.—Merger—Bryan Motor Freight Lines (1939), 25 M. C. C. 543	20

STATUTES CITED

Emergency Railroad Transportation Act, 1933, 48 Stat. 211	17
Interstate Commerce Act, Feb. 4, 1887, ch. 104, 24 Stat. 379, as amended:	
Section 5 (49 U. S. C., § 5)	8, 10, 11, 12, 13, 14, 19, 26, 31, 32
Section 20a (49 U. S. C. § 20a)	8, 24
Transportation Act, 1920, 41 Stat. 456	15, 16, 17
Transportation Act, 1940, 54 Stat. 898	17, 20

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION, APPELLEE

OPINIONS BELOW

The opinion of the specially constituted district court (R. 254–255) is reported in 72 F. Supp. 560. The report of the Interstate Commerce Commission (R. 5) will be found in 267 I. C. C. 207.

JURISDICTION

The final decree of the district court was entered on June 16, 1947 (R. 257). The petition for appeal was filed and allowed on July 22, 1947 (R. 257). Probable jurisdiction was noted on October 13, 1947 (R. 267). The jurisdiction of this Court rests on the Urgent Deficiencies Act of

October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1935, c. 229, 43 Stat. 936, 938 (28 U. S. C. 345).

QUESTION PRESENTED

Whether, in passing upon the agreement of merger here involved,—submitted to and approved by the several classes of stockholders in accordance with the enabling statutes of the respective States of incorporation of the two railroad companies involved—, the Commission was required, as a condition to its approval of the merger under the provisions of Section 5 (2–13), and Section 20a (1–11) of the Interstate Commerce Act, to adjudicate and enforce the claimed contractual rights, arising under State law, of dissenting stockholders as a separate and distinct class, notwithstanding that the Commission found, *inter alia*, that the terms and conditions of the merger as affecting the class of stockholders of which such dissenting group is a part were just and reasonable.[1]

[1] The complaint in the court below states the issue (R. 3): "Failure to include protection for plaintiffs as dissenting shareholders, as a distinct class created by the merger, is contrary to law and a direct violation of the Commission's statutory duty to impose just and reasonable conditions for the protection of all interests concerned."

Appellants in their Brief in Opposition to Motions to Affirm state the issue:

"The issue in this case is whether, in approving a privately formulated plan for the acquisition of the Pere Marquette

STATUTES INVOLVED

The pertinent statutory provisions involved are set forth in the Appendix hereto, *infra*, pp. 34–46.

STATEMENT

On March 8, 1946, the Chesapeake and Ohio Railway Company, the Pere Marquette Railway Company and Alleghany Corporation[2] filed their joint application to the Commission under section 5 of the Interstate Commerce Act for approval of the merger agreement, to be consummated under appropriate enabling statutes of the States of Virginia and Michigan, those being the respective states of incorporation of the two railroads.

Hearing was held during the period April 24–27, 1946.

Following the closing of the record and the filing of briefs, a proposed report was served

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Railroad by the Chesapeake & Ohio Railroad through the exchange of stock of the latter for that of the former, the Interstate Commerce Commission properly held itself to be *without* jurisdiction to determine whether the full priority of dissenting preferred shareholders in Pere Marquette had been satisfied in the exchange—despite the fact that the statute under which the Commission was acting expressly provides that its jurisdiction in such cases shall be not only 'exclusive' but 'plenary'.".

[2] Chesapeake controlled Pere Marquette through ownership of 47.74 percent of the total number of shares of all classes of the latter's outstanding stock. Alleghany, a non-carrier but subject to sections 20 (1–10), 20a (2–11) of the Interstate Commerce Act, controlled Chesapeake through ownership of 7.92 percent of the latter's common stock, its only class of stock outstanding (R. 9, 10).

upon the parties on October 29, 1946. On November 19, 1946, the appellants here asked leave to intervene and file exceptions to the proposed report. Leave was granted on November 21, 1946. Their exceptions were based upon the sole ground that the proposed report failed to accord them, as preferred stockholders, their asserted statutory and contractual rights claimed to have been preserved to them under the laws of the State of Michigan. On April 1, 1947, the Commission, Division 4, issued its report and order, here under consideration, approving the proposed merger and the issuance of securities in accordance with its terms (R. 5). On May 20, 1947, the Commission denied petitions for reconsideration (R. 68). The present suit followed.

There is no attack here upon the affirmative basic findings of the report or upon the ultimate finding that the terms and conditions of the proposed merger are just and reasonable and that the transaction will be in the public interest; that the issuance of securities and assumptions of indebtedness in carrying out the terms of the merger are compatible with the public interest and are necessary and appropriate for and consistent with the proper performance by Chesapeake of service to the public as a common carrier and will not impair its ability to perform that service and are reasonable and necessary for such purposes (R. 62, 63).

Appellants are owners of 2,100 shares of 5 percent Cumulative Preferred Stock of Pere Marquette. Their combined interests represent approximately 2 percent of the total outstanding stock of this class. They dissented from the terms and conditions of the proposed merger, not because the merger was not in the public interest or the treatment accorded the Pere Marquette preferred stockholders as a single class was not just and reasonable or because the public interest was in any way involved in their own treatment as a separate and distinct class of shareholders. They rested their case before the Commission, in the court below and now in this Court, on their assertion that they are entitled under the laws of the State of Michigan to certain contractual rights and that the Commission is the one and only forum in which such rights may be adjudicated and enforced; and that consequently the Commission's failure to adjudicate these claimed rights and make appropriate provision for their enforcement constituted a failure to perform its full statutory duty.

The Commission in passing upon this contention held that, having reached the factual conclusion that the terms and conditions proposed by the applicants were just and reasonable "performance in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated

alike" (R. 54). The Commission went on to say that "Whether dissenting stockholders, as members of a class created by the merger are entitled to better treatment under their charter with Pere Marquette is a question not within our province to decide" (R. 54). The Commission further stated that its holding did not preclude the dissenting stockholders from settling their controversy with the railroads "through negotiation and litigation in the courts" (R. 54).

That the Commission was merely disclaiming its jurisdiction to pass upon claims of contractual rights unrelated to the public interest and not attempting to foreclose them by its finding that the treatment of the preferred stockholders was just and reasonable, is demonstrated by its express recognition of the possibility of court proceedings to adjudicate claims of dissenting shareholders (R. 54). Its concern was the effect upon the merger from the standpoint of public interest of the ultimate settlement of such claims. Consequently it explored the various bases upon which such claims might be settled (R. 55) and arrived at the conclusion, taking into consideration the cash expenditures that might result from such settlements, "that consummation of the merger will not involve a burden of excessive expenditure" (R. 56).

The court below sustained the Commission in its treatment of appellants' contentions. It stated (R. 255):

> As we read the opinion of the Commission it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several states. It specifically left Pere Marquette and Chesapeake and Ohio "free to settle controversies with dissenting stockholders through negotiation and litigation in the courts." We adopt a like course.

Appellants challenge the court's finding that the Commission's ultimate conclusion of the justness and reasonableness of the merger was based upon substantial evidence because the evidence upon which the Commission relied was not before the court (Appellants' Brief, p. 10). Aside from the irrelevance of this finding to the issue here and appellants' failure to question the fairness of the merger agreement at any stage of this proceeding, the statement is ridiculous. As appellants well know the court was obligated to accept the Commission conclusion when appellants did not see fit to introduce the record before the Commission in evidence.

ARGUMENT[1]

I. Appellants have evaded the true issue in this case

Appellants in their Brief have evaded the real issue in this appeal. They premise their whole argument upon the assumption that their asserted

[1] Due to the narrowness of the issue here a Summary of Argument is thought unnecessary.

contractual rights under Michigan law to receive the par value of their stock plus accumulated dividends is not open to question. Thus at the very start in their statement of "Question Presented" they challenge the Commission's failure "to take jurisdiction of an issue as to impairment of preferred shareholders' rights" by the terms of the merger. They say the Commission "refused to recognize the rights of appellants, as holders of preferred stock in the railroad corporation dissolved by the merger, to equities arising under its corporate charter by virtue of accrued but unpaid dividends" (Appellants' Brief, p. 2). Of course if their right to par value of their stock plus accrued dividends had already been incontestably established the payment of such an amount by Chesapeake as a liquidated liability of Pere Marquette would have been obligatory under the terms of the merger agreement which the Commission approved. Consequently there would be no controversy here. But Appellants adroitly obscure this obvious infirmity in their argument by recourse to the phrase "exclusive and plenary" in sections 5 (11) and 20a at the same time carefully avoiding reference to the fact that they thereby seek to have the Commission *judicially* determine the nature and extent of *private contractual rights* and use its authority to impose conditions upon its approval of the merger—which under the statute must be based upon the public interest which will be served thereby—in order

to enforce private contractual rights notwithstanding such adjudication would have no bearing upon the issue of public interest.

Furthermore Appellants attempt to fortify their position by reaching out and bringing into their own field of claimed right all the preferred stockholders and attempting to show that because the Commission failed to recognize the legality of the dissenters' claim all preferred stockholders were not treated justly and reasonably. Thus Appellants say that the Commission failed to deal with the "cumulative prior equities" of the Pere Marquette preferred stock of either "the assenters, abstainers, or dissenters" (Appellants' Brief, p. 20). The fallacy of this contention lies in the fact that the Commission would have no latitude in determining upon a factual basis what would constitute fair treatment of the preferred stockholders. It would have to recognize asserted legal rights as the *sole* measure of fair treatment. Thus the power of the Commission to prescribe terms and conditions "as it shall find to be just and reasonable would be completely nullified.

Finally Appellants seek to justify their contention that the Commission failed to perform its full statutory duty by analogy to its duty in reorganization cases under section 77 of the Bankruptcy Act and to the duty of the Security and Exchange Commission under the Public Utility Holding Company Act. They also accuse the Commission of inconsistency in its treatment of

dissenting stockholders in the instant case and the protection it has accorded minority interests in other section 5 (2) cases. But there is an inherent difference between these classes of cases and the instant one. In bankruptcy reorganization the Commission functions as an adjunct of the Court under a special statute enacted under the federal bankruptcy power and exercises judicial powers specially conferred for the purpose of reorganization. The reorganization plan that is finally approved, if it satisfies all the legal requirements of a valid plan, must be accepted by the stockholders even though it may be distasteful to some. There is no choice. So, too, in a simplification of the capital structure under the Public Utility Holding Company. In an acquisition of control through stock purchase or in the lease of operating rights the approval of the Commission is final and binding upon the minority stock interests even though they voted against the proposal. In such cases, regardless of the degree of public interest that may be involved in their protection, equitable considerations demand that they be treated justly. But in a merger case there is no such compulsion upon dissenting minorities. They are given the choice of assenting to the terms of the merger or seeking redress under state law. Appellants here rest on the claim that Michigan law entitled them to recovery for the loss consequent to their refusal to accept the terms of exchange for their stock.

II. The Commission is not the proper forum for the adjudication of private contractual rights

There is nothing in the language or evolution of Section 5 of the Interstate Commerce Act nor in the legislative history of its several amendments which lends support to the argument that the Commission, in dealing with the consolidations and mergers embraced by those provisions, has succeeded the courts in the adjudication of contractual rights of parties affected thereby. The words "exclusive and plenary" do not warrant such an interpretation.

Appellants' whole argument is pitched on the assertion that the phrase of Section 5 (11), "The authority conferred by this section shall be exclusive and plenary," gave them the statutory right to have the Commission adjudicate the nature and extent of their "full prior equity" as dissenting stockholders and then to insist upon terms and conditions which would fully satisfy their claims under the charter provisions and Michigan law.

Appellants make no attempt to demonstrate through reference to legislative history or any decision of this Court involving merger approval that the "exclusive and plenary" provision of Section 5 (11) was intended to invest the Commission with authority to adjudicate private rights as such. They *assume* this to be the case throughout their brief. But this is the very thing in issue. It is our contention that from the

express terms of the statute, its legislative history and the decided cases that the phrase, "exclusive and plenary" was enacted and designed to make the Commission's authority absolute and complete within the powers conferred by other provisions of the act and was not intended to vitiate such other provisions by granting the Commission carte blanche authority to act on any subject without reference to its relationship to the public purposes of the Act.

Paragraph (2) (a) provides that it shall be lawful, with the approval and authorization of the Commission for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation. Subparagraph (b) provides for application to the Commission for approval of such proposed transaction, notice to the Governor of each State in which any part of the properties of the carriers involved may be located, and to interested parties, and public hearing in case of railroads. Authority is given the Commission to approve the transaction, upon terms and conditions and with modifications found to be just and reasonable, if it shall find (a) the transaction is within the scope of subparagraph (a) and will be consistent with the public interest. Subparagraph (c) provides specific considerations to which the Commission shall give weight, namely (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect

upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

In these provisions and in the subsequent paragraphs dealing with indirect and non-carrier acquisitions of control the public interest inherent in the preservation of adequate and efficient transportation service is the dominant note. In fact the single divergence is the provision for fair and equitable treatment of railroad employees and even there the public interest is present. See *Interstate Commerce Commission* v. *Railway Labor Ass'n*, 315 U. S. 373.

Plainly the words "exclusive and plenary" can only operate within the scope of the authority granted. The Commission's power is supreme in that field, namely, in the control of the terms of proposed mergers in so far as they affect adequate, economical and efficient service and sound economic conditions in transportation. Only to that extent can be read a Congressional intent to supplant state laws. This is demonstrated by paragraph 11 itself which not only preserves applicable State law in respect to required assent of shareholders to the merger or consolidation but provides relief from the operation of all restraints, limitations and prohibitions of State and Federal laws only "insofar as may be necessary

to enable them [carriers] to carry into effect the transaction so approved or provided in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." And finally this paragraph provides that nothing in section 5 shall be construed to create a federal corporation but any power granted by the section to any carrier shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Certainly it cannot be said that the authority vested in the Commission under Section 5 is sufficient to set aside statutory procedures to effect mergers or to change or modify such machinery. It is only when state law presents an obstacle to effectuating a merger which the Commission finds to be in the public interest and upon just and reasonable terms and conditions, that this statute gives the enabling power.

It follows that state law remains effective, whether it be to govern the corporate procedure or to provide a means of paying off non-assenting shareholders, and the Commission's authority does permit it to set aside these laws.

In this case the Commission has rightly interpreted the words, "exclusive and plenary" as relieving it from the operation of any state or federal laws which would interfere with the exercise

of such authority as it finds necessary to exert in approving acquisitions, mergers, etc., rather than an attempt by Congress to define the *scope* of what matters it should pass upon. If this were not so there would have been no purpose in the enactment of subparagraphs (c), (d), (e) and of section 5 (2)—provisions which do specify subjects which the Commission must consider in approving the terms and conditions of merger and acquisition agreements. Significantly, although these subparagraphs specify that certain terms and conditions shall be required by the Commission in approving mergers, no conditions are inserted with respect to stockholders' rights. Moreover the conditions which are enumerated are shown to have definite relation to the public interest. Accordingly the scope of what it should consider other than as expressly provided by subparagraphs (b)–(f) is left to the Commission's discretion to be guided by the national transportation policy.

(a) There is nothing in the legislative history of Section 5 (2-11) or of its prior enactments which support the interpretation placed on those provisions by Appellant

The Transportation Act of 1920 first gave the Commission power to approve consolidations and mergers and removed necessity for obtaining State approval. At the same time the Commission was given control over stock and bond issues of railroads. In connection with the latter

the phrase "exclusive and plenary" was employed for the first time. The new section 20a[4] provided for Commission approval of the issuance of securities or the assumption of indebtedness upon a finding that such issue or assumption, (a) is for some lawful object within the carriers corporate purposes and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. Subparagraph (7) then provides that "The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

The consolidation provisions of the 1920 Act required the Commission by paragraph (4) to prepare and adopt a plan for the consolidation of the railway properties of the United States. It also permitted voluntary consolidations of railroads in one corporation for ownership, management and operation provided the proposed plan was in harmony and furtherance of the complete plan of consolidation mentioned in paragraph (3), and received the Commission's approval. The

[4] Transportation Act, 1920, Section 439, 41 Stat. 494.

Commission's approval had to be predicated upon a finding that the public interest would be promoted by the consolidation. It could prescribe terms and conditions and modifications. It then provided that such consolidations could be effected "notwithstanding the law of any State or the decision or order of any State authority." By paragraph (8) the carriers affected by the approval were relieved from the operation of the "antitrust" laws, State and Federal, and of "all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section."

There is nothing in the legislative history of the 1920 Act which indicates a purpose to enlarge the jurisdiction of the Commission beyond that which would give validity and protection to consolidation in furtherance of the nationwide plan of consolidation which the Commission was required to promulgate. So, too, the legislative history gives no specific explanation of the words "exclusive and plenary" as used in section 20a. But since that section dealt with transactions having only prospective effect the question of adjustment of existing private contractual rights, such as are necessarily involved in a merger, was not present.

Section 5 (a) was amended by the Emergency Railroad Transportation Act of June 16, 1933,

48 Stat. 217. The only change of pertinence here was the incorporating of the former provisions relating to acquisitions of control not involving consolidations or mergers (Section 5 (2)) into paragraph (4) retaining the same standards for approval.

The legislative history of the Transportation Act, 1940, does not afford any affirmative information for the adopting of the Section 20a language—"exclusive and plenary"—into the revised Section 5. The principle concern in reference to that section of the act as expressed in the Committee hearings, the Committee of Three, Committee of Six reports, and in the reports of the Congressional Committee was the question of relieving the Commission from the duty of promulgating nation-wide systems of railroad consolidation and making all consolidations and merger voluntary upon the carriers initiative subject to Commission approval.[1] As to other substantive changes or enlargement of the Commission's powers in passing upon proposed mergers the record is silent. But this paucity of legislative

[1] Report of Commissioners Splawn, Mahaffie and Eastman, April 11, 1938, transmitted by the President to Interstate and Foreign Commerce Committee; Report of Committee of Six, December 1938; letter from Commissioner Eastman transmitting report on H. R. 2533 and 4307, with recommendations of Interstate Commerce Committee of Three and Committee of Six, March 20, 1939; Report No. 433, 76th Cong. 1st Sess., Committee on Interstate Commerce, S. 2009, May 16, 1939; Report No. 1217, House Committee on Interstate and Foreign Commerce, July 18, 1939.

history is not without significance. It is not to be presumed that Congress by the mere statement that "the authority conferred by this section shall be exclusive and plenary," intended to invest the Commission with jurisdiction to adjudicate the infinite variety of legal issues that might arise in connection with mergers to the exclusion of all judicial process. Aside from the constitutional problems which would arise such drastic delegation of power to an administrative body is not to be read out of three words, "exclusive and plenary." Rather the phrase operates only within the delegated authority as defined by other provisions of Section 5.

This interpretation of subparagraph (11) in connection with the Commission's power to attach just and reasonable terms and conditions to its approval conforms to the principles of statutory construction of the Commission's powers under the Interstate Commerce Act heretofore enunciated by this Court; namely, that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond the expressed enactment or its fair inferences; and that important powers should not be read into the Act by implication but should be conferred in clear and unmistakable terms. *Thompson* v. *U. S.*, 246 U. S. 547; *U. S.* v. *Penn-*

sylvania R. Co., 242 U. S. 208; and *I. C. C.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 167 U. S. 479.

III. The Commission has consistently disclaimed authority in Section 5 proceedings to pass upon private disputes arising out of contracts, but has left those matters to settlement by the parties themselves or by the courts

It has always been the Commission's practice in Section 5 proceedings not to involve itself in private disputes between stockholders or others arising from contractual arrangements. This has been true both prior and subsequent to the Transportation Act of 1940. *Raymond Bros.—Purchase—Berzel* (1938), 15 M. C. C. 477, 478; *Yellow Cab Transit Co.—Merger—Bryan Motor Freight Lines* (1939), 25 M. C. C. 543, 546; *Sullivan—Purchase—Service Freight Line, Inc.* (1942), 38 M. C. C. 621; *St. Johns River Line—Purchase—Browns Motor Freight* (1942), 38 M. C. C. 99, 102, 103; *Lancaster Transp. Co.—Purchase—York—Buffalo M. Exp.* (1944), 39 M. C. C. 579, 583; *Jessup—Control—Safeway Trails* (1943), 39 M. C. C. 233, 241; *Carolina M. Exp. Lines—Lease and Purchase—Reed* (1946), 40 M. C. C. 405, 407.*

Appellants rely on the fact that in other Section 5 proceedings the Commission has insisted upon

*Such administrative construction of its jurisdiction should be persuasive even if the construction should be regarded as "nicely balanced." *Switchmen's Union* v. *Mediation Board*, 135 F. (2d) 785, 795; *U. S.* v. *Jackson*, 280 U. S. 183, 193; *L. & N. R. G.* v. *U. S.*, 282 U. S. 740, 757; *Logan* v. *Davis*, 233 U. S. 613.

the submission of terms and conditions which will protect the interests of minority stockholders. See *Nickel Plate Unification*, 105 I. C. C. 425, 443–449; *Unification of Southwestern Lines*, 124 I. C. C. 401, 432–434; *New York Central Unification*, 150 I. C. C. 278, 320; *Denver & St. L. Ry. Co.—Control*, 252 I. C. C. 153, 195. Where the Commission does so, however, it is because such protection is necessary and incidental to its determination of the public interest. To this extent the right of the Commission to protect the interests of minority stockholders has been judicially recognized. *Berg* v. *Cincinnati, N. & C. Ry. Co.*, 56 F. Supp. 842, 848 (E. D. Ky., 1944); *Cleveland, C. C. & St. L. R. Co.* v. *Jackson*, 22 F. (2d) 509, 510, 511 (C. C. A. 6th, 1927). Compare *Otis & Co.* v. *Pennsylvania R. Co.*, 61 F. Supp. 905, 909, 910 (E. D. Pa., 1945).

It will be noted that the Commission cases cited are all acquisition proceedings as distinguished from consolidation and merger cases. In the latter, single ownership is created and separate ownership ceases. In the former, however, the acquired railroad continues to exist. Because of this fact the protection of minority stockholders carries with it a concomitant protection of the public interest in adequate and efficient transportation service. The Commission points this out in *Unification of Southwestern Lines, supra*, p. 433.

But the protection of the interests of minority stockholders upon a factual finding that they will

be accorded fair and equitable treatment is far removed from adjudicating the contractual right of dissenters and enforcing such rights under the power to annex just and reasonable conditions to the approval. The Commission has never provided separate treatment for dissenting stockholders as such apart from the class of stockholders to which they belong.

In the instant case the Commission stated in its report that because "the Chesapeake & Ohio, as controlling stockholder of the Pere Marquette, has an interest in the proposed merger adverse to the minority" the terms and conditions proposed "compel close scrutiny" (R. 54). The Commission there went on to say that it had undertaken such close scrutiny and had reached the conclusion that the terms and conditions proposed were just and reasonable (R. 54). Having reached that conclusion and making certain "that all stockholders of the same class are to be treated alike," the Commission regarded its duty as to stockholders as completed and left to the courts the question as to whether dissenting stockholders were entitled to better treatment in satisfaction of a contractual obligation due them from Pere Marquette.

IV. The decided cases confirm the Commission in its interpretation of its powers under Section 5 (2) in respect to the enforcement of private rights

This Court has held that the Interstate Commerce Commission is without power to pass upon

private rights which are neither dependent upon or ancillary to the exercise of its statutory authority. *Cleveland, C., C. & St. L. R. Co. v. U. S.*, 275 U. S. 404; *Pittsburgh & West. Va. R. Co. v. U. S.*, 281 U. S. 479; *Claiborne-Annapolis Ferry Co. v. U. S.*, 285 U. S. 382.

The principle enunciated by this Court in *N. Y. Central Securities Co. v. U. S.*, 287 U. S. 12, 27, 28 (1932), is applicable here notwithstanding appellants have given it the dignity of a footnote citation (Appellants' Brief, p. 25, note). There one of the grounds urged for setting aside an order of the Commission, approving a proposed lease of one railroad by another and the assumption of liability by the lessor of certain securities of the lessee, was that the lease was in violation of the laws of Ohio. To this contention this Court said:

> The question of the right of a State of incorporation, in a direct proceeding, to challenge the leases as *ultra vires* is not before us. See *Cleveland, Cincinnati, C. & St. Louis Ry. Co. v. United States*, 275 U. S. 404, 414. The order of the Commission under § 5 (2) is permissive, not mandatory. There is no warrant for concluding that the Congress intended to fetter the exercise of the Commission's authority by requiring that the Commission before making its order must determine whether the acquisition is within the corporate powers of the carrier under state laws.

In the same case the lower court had disposed of this issue as follows (*N. Y. Central Securities Corp.* v. *U. S.*, 54 F. (2d) 122, 129):

> The order of the Commission are further attacked on the ground that the leases as authorized are invalid under the law of Ohio. * * * Plaintiff contends that the approval of the lease under section 5 (2) cannot supply the lack of power in the corporation to make such a lease; and that the approval of the assumption of security obligations under section 20a is beyond the power of the Commission because of the express statutory limitation that the assumption be "within its corporate purposes." The first objection is, in substance, that it was *ultra vires* the corporation to execute these leases. While the fact that the order was permissive rather than mandatory does not deprive the court of jurisdiction in this proceeding (*Chicago Junction Case*, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667), the attack based upon the state law limitation of corporate power has no proper place in a suit to annul the order. *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 488, 50 S. Ct. 378, 74 L. Ed. 980, and cf. *Cleveland etc. Ry.* v. *United States*, 275 U. S. 404, 48 S. Ct. 189, 72 L. Ed. 338. The controversy as such is between the corporation and the minority stockholders.

These decisions not only recognize that legal rights under state laws are not to be enforced by

the Commission but that the "exclusive and plenary" authority conferred upon the Commission under Section 20a is inadequate to that end.

In *Missouri Pac. R. Co.* v. *U. S.*, 4 F. Supp. 449 (D. C. E. D. Ky. 1933) affirmed 293 U. S. 524, the Commission had approved the acquisition of stock control of the Cotton Belt Railroad by the Southern Pacific under section 5 (2). Suit to set aside this approval was brought by the Missouri Pacific and one of the contentions made by plaintiff was that in arriving at just and reasonable terms and conditions of its approval the Commission should have determined what rights the plaintiff had under an existing agreement between it and the Southern Pacific. On this point the Commission had said (*St. L. S. W. R. Co. Control*, 180 I. C. C. 175, 203):

> Any order that we may issue in this proceeding authorizing the acquisition of control as sought must be based upon a finding that such acquisition of control is in the public interest. It is not within our province to construe the Gould-Huntington Agreement or adjudicate the rights of the parties thereunder. The point here at issue is not whether the Gould-Huntington Agreement is in the public interest, but whether the acquisition of control as sought is in the public interest. The determination of the status of the parties under this Agreement rests with the courts.

On the same point the District Court after reviewing applicable cases held (p. 456):

> These cases establish not only that the Interstate Commerce Commission, in determining whether it will exercise a power conferred or perform a duty imposed upon it, has no power to take into consideration collateral matters, such as private rights, but also that the courts in an attack made upon its order have no power to consider same.

Two cases decided after the enactment of the Transportation Act of 1940 sustain the Commission's interpretation of its powers. *Watson Bros. Transp. Co.* v. *Jaffa*, 143 F. (2d) 340 (C. C. A. 8th, 1944), and *Otis & Co.* v. *Penna. R. Co.*, 61 F. Supp. 905 (E. D. Pa., 1945), affirmed 155 F. (2d) 522 (C. C. A. 3d, 1946).

In the *Watson Bros.* case the court considered its jurisdiction to review a suit for specific performance involving a lease of certain motor carrier operating rights. The Commission had approved a transfer to plaintiff of such rights under Section 5 (2). Defendant Jaffa thereafter refused to carry out his agreement with plaintiff. The lower court dismissed the complaint. The Circuit Court in reversing the court below considered, inter alia, the claim that the subject matter of the dispute was for the Commission

to determine in the first instance. It said (pp. 345-346):

> Very broad and comprehensive powers are conferred upon the Interstate Commerce Commission in all matters of interstate transportation, and in the exercise of its power to grant or to deny its approval to applicants for authority to operate particular interstate trucking routes it undoubtedly may hear and determine disputes between rival claimants asserting the right to carry on the same operation. In such disputes the public interest is paramount and it is for the Commission to identify and to protect the public interest in the first instance. As shown by the pleadings in this case the Commission determined after hearing that the transaction between Watson Bros., Inc., and Jaffa would be consistent with the public interest, and the transaction was approved, but the Commission prescribed conditions upon which Watson Bros., Inc., were authorized to operate. It preserved the public interest by permitting temporary operation of the routes in question by Watson Bros., Inc., and thereafter by permitting temporary operation thereof by Holdcroft.
>
> But the Commission remains an administrative board, exercising administrative power, and is not a court, and has no judicial power, although it has and exercises a quasi judicial power. 15 C. J. S.,

Commerce, § 141, p. 501. In the first volume of its reports, the Commission declared "The power to enforce contracts is not one which has been confided to us", *Traders, etc.* v. *Philadelphia, etc., Co.*, 1 I. C. C. 122, at page 131, and although the wide extension and multiplication of its duties have required it to perform many functions in the protection of the public interest in transportation which were not then foreseen, still its further expression in the same case retains its force, viz, "If petitioner has contracts * * * and if in any of the matters related in this evidence it has been injured and wronged by the defendants, there are courts provided by law having jurisdiction to hear and determine controversies of that character." We need not decide that the Commission could never, in any form of proceeding before it, be required to determine the dispute between the parties here concerning the duty of Jaffa towards Watson Bros., Inc., nor need we inquire particularly into the means of compulsion or want of them on the part of the Commission.

In the *Otis* case action was brought by Otis, a stockholder, of the Pennsylvania Railroad, alleging wrongful action by defendants in connection with the sale of certain bonds of the railroad. Among other defenses was the claim that the jurisdiction of the court was excluded because of the fact that the same issues had been presented to and decided by the Interstate Commerce Com-

mission under section 20a. In connection with this defense the court held (pp. 909-910):

> As to the defendants' res adjudicata defense, it may be noted at once that that theory was rejected by the United States Supreme Court in the case of *Pittsburgh & W. Va. Ry. Co.* v. *United States*, 1930, 281 U. S. 479, 50 S. Ct. 378, 74 L. Ed. 980. There, a minority stockholder intervened in a Commission proceeding involving the establishing of a union passenger station as Cleveland, and alleged, inter alia, that the contracts by the Wheeling & Lake Erie Ry. Co. were made in violation of the law of Ohio, the Wheeling directors did not give Wheeling the benefit of unbiased judgment, adequate and not the best obtainable. 281 and the price for Wheeling's site was in-transaction and the stockholder sought an injunction under the Urgent Deficiencies Act, 1913. 38 Stat. 220, 28 U. S. C. A. § 47. [Court's opinion garbled in report.] On direct review, the Supreme Court said, 281 U. S. at page 488, 50 S. Ct. at page 381, 74 L. Ed. 980:
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> "Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this

Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission.' (Citing cases.) *It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the District Court.* Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals." [Emphasis supplied.]

The Supreme Court thereupon dismissed that part of the bill without prejudice. See also, *New York Central Securities Corporation* v. *United States*, 1932, 287 U. S. 12, 28, 29, 53 S. Ct. 45, 77 L. Ed. 138, the final decision in a series of actions beginning with *Cleveland, C., C. & St. L. Ry. Co.* v. *Jackson*, 6 Cir., 1927, 22 F. 2d 509, on which the defendants rest heavily. Since an intervening minority stockholder is not, in an injunction proceeding entitled to judicial review under the Urgent Deficiencies Act on questions such as breach of fiduciary duty, and since such questions are not "ancillary to nor dependent upon the judgment as to the order," it follows that the plaintiff here has properly sought to enforce its rights in this action, and that the proceedings before the Interstate Commerce Commission are not res adjudicata.

See, *Casey* v. *Woodruff*, *Sup.*, 1944, 49 N. Y. S. 2d 625, 640–642.

The Commission, under the statutory authority here involved, Act Feb. 28, 1920, 41 Stat. 494, 49 U. S. C. A. § 20a, does not determine private rights. In *Casey* v. *Woodruff*, supra, a case strikingly similar to the present controversy, Justice Shientag, in a well considered and authoritative opinion, stated, 49 N. Y. S. 2d at page 642:

"In formulating plans for the issuance and sale of the securities of a railroad, the board of directors necessarily must consider the public interest because the railroad is engaged in public service. Obviously it would be futile to propose a security issue which the Commission would be bound to disapprove as not 'compatible with public interest' or with the proper performance by it of service to the public. § 20a. To summarize what has been said on this point, it is clear that in determining that the proposed issue of Series D bonds was improvident and unwise the Commission, whether its action was based wholly or in part on the public interests, did substitute its own judgment for that of the directors. It did not, however, purport to pass upon the personal liability of the directors for alleged breach of fiduciary duty, nor did it have the slightest basis of jurisdiction for that purpose."

These cases, we submit, support the Commission's views in the instant case that the de-

termination of rights asserted to exist by virtue of contract is for the courts and not the Commission.

V. Practical considerations deny the broad interpretation which appellants would give to Section 5 (2-11)

The full import of appellants' argument is to invest the Commission with complete control over every phase of carrier consolidations and mergers irrespective of whether or not the issues presented bear any relation to the public interest. If private rights are to be adjudicated by the Commission it is difficult to see at what point, if any, judicial inquiry may step in. Must all debts, claims, liabilities, and obligations be determined by the Commission before it has completed its statutory duty? Will it require the Commission to interpret and administer the laws of the forty-eight different States? Obviously the Commission is neither competent nor equipped to undertake such a gigantic burden.

CONCLUSION

In this case the Commission has attempted to deal fairly with *all stockholders* involved in the merger. It stated in its report that close scrutiny of the terms and conditions proposed was required because of the fact that Chesapeake, as owner of the controlling interest in Pere Marquette, had an interest in the proposed merger adverse to the interests of the minority stock-

holders. It specifically considered the very claim which appellants asserts that because its jurisdiction is "exclusive and plenary" it must consider and determine the contractual rights of the dissenting stockholders. But it took the view that the criterion to be applied in its disposition of matters under Secton 5 was the controlling public interest and that in exercising its authority it was to be guided primarily by consideration for "adequacy of transportation service, its essential conditions of economy and efficiency and appropriate provision and best use of transportation facilities" (*N. Y. Central Securities Corp.* v. *U. S., supra*).

We respectfully submit that the judgment and decree of the court below should be affirmed.

Respectfully submitted.

DANIEL W. KNOWLTON,
Chief Counsel,

DANIEL H. KUNKEL,
Attorney,
Interstate Commerce Commission.

SEC. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common

carrier by water subject to part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on the date this paragraph as amended takes effect, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in

or joint use of, any railroad line or lines owned or operated by any other such carrier and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by, such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order

unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result

in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provision of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to

any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and (2) and 220 of part II; and section 313 of part III (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of

this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and person affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or

companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

(7) The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2) to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person.

(8) The district courts of the United States shall have jurisdiction upon the complaint of the Commission, alleging a violation of any of the provisions of this section or disobedience of any order issued by the Commission thereunder by any person, to issue such writs of injunction or other proper process, mandatory or otherwise, as may be necessary to restrain such person from violation of such provision or to compel obedience to such order.

(9) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7), as it may deem necessary or appropriate.

(10) Nothing in this section shall be construed to require the approval or authorization of the Commission in the case of a transaction within the scope of paragraph (2) where the only parties to the transaction are motor carriers subject to part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1 (3)), and where the aggregate number of motor vehicles owned, leased, controlled, or operated by such parties, for purposes of transportation subject to part II, does not exceed twenty.

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or

franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

SEC. 20a. (1) That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this part, or any corporation organized for the purpose of engaging in transportation by railroad subject to this part.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capi-

tal stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by

any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).

(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceeding. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

(8) Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if is-

sued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. * * *

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pp. 1, 15, 16,
Frankfurter J. pp 6, 7.

SUPREME COURT OF THE UNITED STATES

No. 258.—October Term, 1947.

Albert E. Schwabacher, Albert E. Schwabacher, Jr., James M. Schwabacher et al., Appellants, v. The United States of America, Interstate Commerce Commission et al.	Appeal From the District Court of the United States for the Eastern District of Virginia.

[May 3, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

"This controversy grows out of the voluntary merger of Chesapeake & Ohio Railway Company and Pere Marquette Railway Company, which companies, together with Alleghany Corporation, sought approval by the Interstate Commerce Commission." Pere Marquette is incorporated under the laws of Michigan, while Chesapeake & Ohio is chartered by Virginia. Chesapeake & Ohio acquired and for some years exercised active control of Pere Marquette, whose properties and operations complement rather than compete with those of Chesapeake & Ohio. Late in 1945 merger proceedings were commenced under enabling statutes of the two states and were consummated with approval of considerably more than the number of shares made necessary by statutes of the respective states. The Interstate Commerce Commission found, and there is no attack upon the findings, that the public interest is served by merger and unification of these properties and operations. The Commission also concluded that the plan as a whole, and as applied to each group of shareholders, is just and reasonable, and there is no attack upon this conclusion except that by the appellants which is treated fully herein. Consequently, details of the plan are of little importance to this litigation.

Appellants are owners of 2,100 shares of $100 par 5% cumulative preferred stock of Pere Marquette. Their interests aggregate a little less than 2% of the outstanding stock of this class. Dividends on this stock have been unpaid since 1931 and, as of the commencement of this controversy, were in arrears in the sum of $72.50 per share, an amount that is increasing with time. The Pere Marquette charter provides for full payment of the stock at par, plus accrued unpaid dividends, "in the event of dissolution, liquidation, or winding up of the company, voluntary or involuntary . . . before any amounts are paid to holders of the . . . common stock." The appellants contend that the merger hereinafter described terminates the corporate existence and, under this clause as construed by Michigan law, amounts to a "winding up." They insist that since the merger makes provision for some compensation to common stockholders these appellants have the right, under Michigan law, to have their shares recognized on the basis of at least $172.50 each. The Commission found the market value per share ranged, at different times, from $87 to $99, while the merger terms give stocks in exchange which would have realized about $90 and $111 per share on the same dates. Appellants dissented from the merger, but Michigan law provides no specific right or procedure for appraisal and retirement of the holdings of a stockholder dissenting from a railroad merger.

When application was filed with the Interstate Commerce Commission under § 5 of the Interstate Commerce Act as amended (49 U. S. C. § 5), for approval and authorization of the merger,[1] as well as for other relief,

[1] Section 5 as amended provides in part as follows:

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in sub-division (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for

appellants intervened and asked that body to determine, recognize and protect their asserted right to the full legal liquidation figure. The Commission approved the

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the ownership, management, and operation of the properties theretofore in separate ownership . . .

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or persons seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, . . . and shall afford a reasonable opportunity for interested parties to be heard . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . .

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect . . . upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory . . . ; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected . . . .

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest . . .

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof . . .

"(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under

merger and the merger terms, finding them just and reasonable as to each class of stockholders. However, it disclaimed jurisdiction to pass upon the further claims of the appellants asserted on the basis of their interpretation of Michigan law. It reviewed at some length the economic position of the stock. It recited that these shares had received no dividends since 1931 and that appellants' witnesses agreed that these stockholders could not expect to receive any dividends for many years, apart from the merger. The Commission also pointed out the deficit in operations of Pere Marquette for the first quarter of 1946 as contrasted with the net income of Chesapeake and Ohio, and concluded that "On the whole it would seem that the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by the merger of their company into Chesapeake & Ohio." The

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applicable State law, in which case the number so required shall assent, of the vote of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under any State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its power under its corporate charter or under the laws of any State."

Commission did not question that the stockholders, on liquidation, dissolution or winding up of Pere Marquette, would be entitled to be paid in full the par value of their shares and accumulated dividends before any payment to holders of common stock. It did not undertake to determine the ultimate worth of these stocks in case of an actual liquidation, but it considered their present intrinsic value on a capitalized earnings basis, an actual yield basis, and its present market position and concluded: "Accordingly, considering Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that as to the stockholders of both parties generally the proposed ratios of exchange, stock issues and assumptions of indebtedness, are just and reasonable."

The Commission then noted the contention of the appellants that as to them the terms were not just and reasonable, because they are deprived of contract rights under Michigan law, which they have not waived. It is contended that the Commission should not remit the dissenting stockholders to remedies in state courts as the Commission would thereby decline the jurisdiction conferred by § 5 and § 20a of the Act.[2] But the Commission considered that it was entrusted with authority to decide the public interest aspects of the merger of these transportation facilities and that it could not be expected to enter into the question of "compensation of dissenting stockholders on specified bases" before approval and merger. It thought that, having found the treatment of each class to be just and reasonable, it had done its full duty "when we make certain that all stockholders of the same class are to be treated alike." It declined to decide the Michigan law question as to what rights of dissenting

[2] For pertinent provisions of § 5 and § 20a see notes 1 and 15 respectively.

stockholders were, and whether the merger was equivalent to a liquidation, but said: "This does not mean that the Chesapeake & Ohio and the Pere Marquette do not remain free to settle controversies with dissenting stockholders through negotiation and litigation in the courts."

Taking into account the small percentage of the dissenting shares, the current assets position of the Chesapeake & Ohio, and the maximum possible cost to the merged company of the settlement of these claims on the basis most favorable to appellants, it considered that the company was amply able to bear "any probable expenditure of cash that it might be required to make in connection with the merger. Accordingly it appears that consummation of the merger will not involve a burden of excessive expenditure." The Commission thus left in a state of suspense, subject to further litigation or negotiation, these claims concerning the extent of the capital obligations of a constituent company, after examining them sufficiently to determine only that, however settled, they did not involve enough to affect the solvency of the new company or jeopardize its operations.

The Commission denied appellants' petition for rehearing and they filed suit in the United States District Court for the Eastern District of Virginia to set aside the order authorizing the merger. A court of three judges, convened as required by law,[3] sustained the Commission, 72 F. Supp. 560. Appellants bring to us[4] the question whether the Commission, in view of its authority over mergers, which is declared to be exclusive and plenary, could decline to determine just what the dissenting stockholders' legal rights were under the Michigan law and the Pere Marquette charter, and to recognize them in full by the terms of the merger.

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[3] 28 U. S. C. § 47.

[4] 28 U. S. C. § 47 (a); 28 U. S. C. § 345.

The disposition of appellants' claims, as well as the nature of the claims themselves, requires consideration of the relative function and authority of federal and state law in regulating and approving voluntary railroad mergers. The appellants contend that their share in the merged company is to be measured by, or their remedies as dissenters are to be found in, state law, but that the federal agency is bound to determine and apply that law. The Commission on the other hand refuses either finally to foreclose or to allow these claims. It apparently leaves it open to the state courts, or to the parties by negotiation, to add to the surviving carrier's capital obligations which the Commission has found to be just and reasonable, others founded only in state law and as to which it has made no such findings. We conclude that neither position is wholly consistent with the federal statutory plan for authorization and approval of mergers.

It is not for us to adjudicate the existence or the measure of any rights that Michigan law may confer upon dissenting stockholders. Neither the Commission nor this Court can make a plenary and exclusive decision as to what the law of a state may be, for the function of declaring and interpreting its own law is left to each state of the Union. But the effect of the state law in relation to a constitutional Act of Congress, in view of the constitutional provision that the latter shall be "the supreme law of the land," "laws of any state to the contrary notwithstanding," is for us to determine. Our first inquiry here, therefore, is whether the Interstate Commerce Act accords recognition to those state law rights, if any exist. To determine this federal question we assume, but do not decide, that Michigan law would consider this merger to be a liquidation, and would regard the recognition given to the common stock as entitling these dissenters to "full payment" in cash or its equiva-

lent for both the par value of their preferred shares and accrued unpaid dividends thereon. Assuming such to be their rights under the law of the State, we must decide whether approval of a railroad merger under the Transportation Act of 1940 [5] is conditioned upon observance of such state law rights or can be made by the Commission contingently subject to them. A resume of the history of that Act throws light on the problem dealt with by that legislation.

The basic railroad facilities of the United States were constructed under state authorization and restrictions by corporations whose powers and limitations were prescribed by state legislatures, or resulted from limitations on the states themselves. Construction in reference primarily to local or regional transportation needs created duplicating and competing facilities in some areas and provided inadequate ones in others. Expansion necessary to serve advancing national frontiers was stimulated by extensive subsidies from the Federal Government, largely in the form of land grants. But the stress and strain of World War I brought home to us that the railroads of the country did not function as a really national system of transportation. That crisis also made plain the confusions, inefficiencies, inadequacies and dangers to our national defense and economy flowing from the patchwork railroad pattern that local interests under local law had created.

The demand for an integrated, efficient and coordinated system of rail transport, equal to the needs of our national economy and defense, resulted in the Transportation Act of 1920.[6] In a series of decisions on particular problems, this Court defined the general purposes of that Act to be the establishment of a new federal railway pol-

[5] Act of September 18, 1940, 54 Stat. 898.
[6] Act of February 28, 1920, 41 Stat. 456.

icy [7] to insure adequate transportation service by means of securing a fair return on capital devoted to the service, restoration of impaired railroad credit, and regulation of rates, security issues, consolidations and mergers in the interest of the public. The tenor of all of these was to confirm the power and duty of the Interstate Commerce Commission, regardless of state law, to control rate and capital structures, physical make-up and relations between carriers, in the light of the public interest in an efficient national transportation system. *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Railroad Commission of California* v. *Southern Pacific R. Co.*, 264 U. S. 331; *Texas Pacific R. Co.* v. *Gulf, Colorado & Santa Fe R. Co.*, 270 U. S. 266.[8]

[7] "It is manifest . . . that the Act made a new departure . . ." Chief Justice Taft, in *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585.

[8] In *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 478, in referring to the *Wisconsin* case, 257 U. S. 563, and the *New England Divisions Case*, 261 U. S. 184, the late Chief Justice said: "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable and discriminatory rates against persons and localities. The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

As a means to this end, the 1920 Act required [9] the Commission to prepare and adopt a plan for nation-wide consolidations of the railway properties of the country. It made this master plan the governing consideration in approving voluntary consolidations of railroads which were permitted only if in harmony with and in furtherance of the Commission's overall plans.[10] If they met that test, Congress provided that mergers could be consummated notwithstanding any restraint or prohibition by state authority.[11]

By 1940 it had become apparent that the ambitious nation-wide plan of consolidation was not bearing fruit. Various studies and investigations [12] led to the conclusion that it was a case where the best was an enemy of the good and waiting for the perfect official plan was defeating or postponing less ambitious but more attainable voluntary improvements. The Transportation Act of 1940 relieved the Commission of formulating a nation-wide plan of consolidations. Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice and reasonableness, in which case they should become effective regardless of state authority.[13] The Act does not specify every consideration to which the Commission must give weight in determining whether or not any plan meets the tests. Section 5 (2) provides only that "among others," the Commission

[9] § 407 (4).

[10] § 407 (6) (a).

[11] § 407 (8).

[12] See, for example, report and recommendations by the President's Committee of Six, appointed September 20, 1938, whose report dated December 23, 1938, is considered part of the legislative history of the Transportation Act of 1940.

[13] See note 1, *supra*.

shall consider the effect upon adequate transportation service, the effect of inclusion or failure to include other railroads, total fixed charges, and the interests of the carrier employees affected. This Court has recently and unanimously said in reference to this Act, "Congress has long made the maintenance and development of an economical and effcient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind." *Seaboard Air Line R. Co.* v. *Daniel*, 333 U. S. 118."[14]

So reading the legislation relevant to this merger, we find that approval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it "will be consistent with the public interest." (§ 5 (2) (b).) Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable." (§ 5 (2) (b).) Third, assent of a "majority, unless a different vote is required under applicable state law, in which

[14] The Act itself included a statement of the "National Transportation Policy" in these terms: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

case the number so required shall assent, of the votes of the holders of shares entitled to vote." (§ 5 (11).) When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of "restraints, limitations and prohibitions of law, federal, state or municipal, insofar as may be necessary to enable them to carry into effect the transactions so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission and to hold, maintain and operate any properties and exercise any control or franchise acquired through such transaction." (§ 5 (11).)

The Commission, under this Act as well as the Act of 1920, was also given complete control of the capital structure to result from a merger.[15] The carrier, even if per-

[15] Repeated recommendations of the Commission that the federal government occupy the field of regulation of railroad security issues and assumption of obligations were followed in 1920 by addition of § 20a to the Interstate Commerce Act (§ 439 of the Transportation Act of 1920, 41 Stat. 494).

As early as 1907 the Commission had stated that "the time has come when some reasonable regulation should be imposed upon the issuance of securities by railways engaged in interstate commerce." 12 I. C. C. 277, 306. This recommendation was renewed in the Commission's annual report for 1907, p. 24, and in every succeeding annual report up to and including 1919. The Commission incorporated in the 1919 report the statement concerning recommended legislation it had submitted to the Senate Interstate Commerce Committee, which included a recommendation for regulation of security issues.

House Report No. 456, 66th Cong., 1st Sess. (November 10, 1919), said with respect to the section which later became § 20a: ". . . The enactment of the pending bill will put the control over stock and bond issues exclusively in the hands of the Federal Government and will result in uniformity and greater promptness of action."

Section 20a as enacted in 1920 remained unchanged by the Transportation Act of 1940 and provides in part as follows:

"(2) . . . it shall be unlawful for any carrier to issue any share

mitted by state law which created it, may issue no stock, bond or evidence of indebtedness without approval. It may assume no obligation in respect of the securities of another person or corporation except with approval. And the approval is to be given only on a finding that it "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which

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of" capital stock or any bond or other evidence of interest in or indebtedness of the carrier . . . or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose . . .

"(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority . . .

"(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and obligations or liabilities in accordance with the provisions of this section without securing approval other than as herein specified . . .

is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." 49 U. S. C. § 20a (2).

The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive and independent of all other state or federal authority. § 5 (11);[16] § 20a (7).[17]

The Commission, as we have seen, has found that the liabilities asserted by appellants, if settled by litigation or negotiation, will not impair the carrier's ability to perform its service, but it has not found the assumption of such liabilities to be compatible with the public interest under § 5 and § 20a. Indeed, since these claims exceed what the Commission has found to be just and reasonable, it could hardly find that assumption of such claims would be compatible with the public interest.

It appears to us inconsistent with the Interstate Commerce Act[18] for the Commission to leave claims growing

[16] For text of § 5 (11) see note 1.

[17] For text of § 20a (7) see note 15.

[18] In an early case (*Pittsburgh & W. Va. R. Co.* v. *Interstate Commerce Commission*, 293 F. 1001, appeal dismissed 266 U. S. 640) in which the constitutionality of § 20a had been upheld, the Court said: "If a 'fair return on capital devoted to the transportation service' [*New England Divisions Case*, 261 U. S. 184, 189] was to be insured the railway companies, and at the same time proper service and equitable rates accorded the public, the supervision of the issuance of stock, the incurring of bonded indebtedness, the extension and consolidation of railway lines, becomes of utmost importance. Without this power to supervise the issue of stocks and bonds, and thus limit the dividend and interest obligations of the carriers, as well as the expenditures in extensions and improvements, the fixing of adequate rates to insure a just return to the carrier, and at the same time equitable protection to the public, would be impossible . . ."

out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves. We think that the Commission must pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of merger. If some greater amount than that specified in the agreement is to be allowed to any class of stockholders, it must either deplete the cash or inflate the liabilities or capital issues of the new company. It may be that in this case the merged company will be strong enough to carry this burden and still perform its public service. But that is not the sole purpose of the supervision provided by statute. It is also in the public interest that no capitalization or indebtedness be carried over except that which meets the test of the Act in all other respects. We think the Commission was in error in assuming that it did not have, or was at liberty to renounce or delegate, power finally to settle the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity.

We think it is equally clear that the Commission must look for standards in passing on a voluntary merger only to the Interstate Commerce Act. In matters within its scope it is the supreme law of the land. Its purpose to bring within its scope everything pertaining to the capital structures of such mergers could hardly be made more plain. Indeed, the very fact on which appellants rely heavily, that the Commission's jurisdiction is "plenary" and "exclusive," argues with equal force that federal law is also plenary and exclusive. The Commission likely would not and probably could not be given plenary and exclusive jurisdiction to interpret and apply any state's law. Whatever of rights the appellants ask the Commis-

sion to assert must be founded on federal, not on state, law.

Apart from meeting the test of the public interest, the merger terms, as to stockholders, must be found to be just and reasonable. These terms would be largely meaningless to the stockholders if their interests were ultimately to be settled by reference to provisions of corporate charters and of state laws. Such charters and laws usually have been drawn on assumptions that time and experience have unsettled. Public regulation is not obliged and we cannot lightly assume it is intended to restore values, even if promised by charter terms, if they have already been lost through the operation of economic forces. *Cf. Market Street R. Co.* v. *Commission*, 324 U. S. 548. In appraising a stockholder's position in a merger as to justice and reasonableness, it is not the promise that a charter made to him but the current worth of that promise that governs, it is not what he once put into a constituent company but what value he is contributing to the merger that is to be made good.

In construing the words "fair and equitable" in a federal statute of very similar purposes, we have held that although the full priority rule applies in liquidation of a solvent holding company pursuant to a federal statute, the priority is satisfied by giving each class the full economic equivalent of what they presently hold, and that, as a matter of federal law, liquidation preferences provided by the charter do not apply. We said that, although the company was in fact being liquidated in compliance with an administrative order, the rights of the stockholders could be valued "on the basis of a going business and not as though a liquidation was taking place." Consequently the liquidation preferences were only one factor in valuation rather than determinative of amounts payable. *Otis & Co.* v. *Securities & Exchange Commission*, 323 U. S. 624.

The appellants here, although the enterprise is to continue, insist on a valuation according to the letter of the charter. By this method the longer their stock is in default of dividends or earnings, the greater interest it would have in the merged properties if the common stock was to be recognized at all. The Commission, however, did not consider that a long continued default and the prospect of further default added greatly to the present intrinsic or market value of the stock in exchange. Its measuring rod was an economic rather than a legalistic one. The Commission considered the stock's past yield, present market value, and future prospects. It found that, all things considered, the merger terms gave to these appellants in new stock the fair economic equivalent of what they already held. It considered the deal just and reasonable on an exchange basis for a continuing enterprise. But it did not undertake to say whether, under the letter of their charter as construed under the law of Michigan, the preferred stockholders may not have a contract that would exact more than an economic equivalent.

Since the federal law clearly contemplates merger as a step in continuing the enterprise, it follows that what Michigan law might give these dissenters on a winding-up or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service. Federal law requires that merger terms be just and reasonable to all groups of stockholders, in contemplation of the continued use of their capital in the public calling to which it has been dedicated. Congress has made no provision by which minority stockholders, dissatisfied with a proposed railroad merger, may block it or compel retirement of their capital, as statutes often permit to be done in the

case of private corporations where the public interest is not much concerned with its effect on the enterprise. And since Congress dealt with the subject of stockholders' consent, its failure to provide for withdrawal of non-consenting capital cannot be considered an oversight to be supplied by us. A part of the capital dedicated to a railroad enterprise cannot withdraw itself without authorization any more than all of the capital can withdraw itself and abandon the railroad without approval. It must submit to regulations and to readjustments in the public interest on just and reasonable terms.

In determining whether each class of stockholder receives an equivalent of what it turns in, the Commission, of course, is under a duty to see that minority interests are protected, especially when there is an absence of arm's length bargaining or the terms of the merger have been imposed by management interests adverse to any class of stockholders. The Commission indicates both awareness and discharge of this duty in this case. Its finding that this plan is just and reasonable is not challenged here except on the basis of Michigan law. When stockholders are given what it is just and reasonable they should have, the Interstate Commerce Act does not permit state law to impose greater obligations on the financial structure of the merging railroads with consequent increased calls upon their assets or earning capacity.

We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable. In making that determination, those rights are to be considered to the extent that they may affect intrinsic or

market values. While the Commission has found that what the appellants are given in this plan is just and reasonable, the record indicates that it may have declined to consider these claims, even if they are found to have some effect on the intrinsic value of the stock, because it thought it lacked jurisdiction. Under these circumstances, we cannot be sure that in arriving at its conclusion that the plan was just and reasonable it did not exclude some factors that it should consider under the views set out in this opinion. We therefore reverse the judgment below and remand the case to the Commission for reconsideration under the principles herein expressed.

Reversed and remanded.

MR. JUSTICE REED took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 258.—October Term, 1947.

Albert E. Schwabacher, Albert E. Schwabacher, Jr., James M. Schwabacher et al., Appellants, *v.* The United States of America, Interstate Commerce Commission et al.	Appeal From the District Court of the United States for the Eastern District of Virginia.

[May 3, 1948.]

Mr. Justice Frankfurter, dissenting.

The railroads of this country are operated by not less than 693 corporations. These exist by virtue of charters granted by the several States,[1] the laws of which govern their internal affairs, and, more particularly, the rights and liabilities of their stockholders. The Chesapeake & Ohio is chartered by Virginia, the Pere Marquette by Michigan. The laws of Virginia and Michigan respectively determine the conditions under which each may combine with other corporations. The votes of sufficient stockholders of these two corporations to satisfy the laws of their respective States were in favor of a voluntary agreement for the absorption of the Pere Marquette by the Chesapeake & Ohio. To consummate this agreement, however, required the authorization of the Interstate Commerce Commission under the terms of § 5 (2) of the Interstate Commerce Act, as amended by the

[1] According to the annual reports of Class I and Class II carriers on file with the Interstate Commerce Commission there is at present only one operating carrier chartered by Congress: the Texas and Pacific Railway. See the Act of March 3, 1871, 16 Stat. 573, as amended by the Act of February 9, 1923, 42 Stat. 1223.

Transportation Act of 1940. The agreement provided, in short, that the total outstanding securities of the Pere Marquette, amounting to 450,460 shares of common, 124,290 of cumulative preferred, and 112,000 of prior preference, were to be exchanged for 211,429.4 shares of Chesapeake & Ohio common and 312,272.2 preferred. All but 9% of the security holders of the Pere Marquette cumulative preferred assented to this arrangement. The appellants, holding less than 2% of that class of stock, stood on their rights under Michigan law, claiming that they were entitled to the dividends unpaid since 1931, amounting to $72.50 per share.

The Interstate Commerce Commission approved the proposed merger but refused to pass on the legal claims thus asserted under Michigan law by the appellants. The Commission ruled that it was not called upon to pass upon individual rights against a merged road when the potential recognition of such rights, under appropriate State law, could not affect the public interest which it is requisite for the Commission to safeguard before authorizing a merger. For the Commission held that, even if the appellants' claims were sustained by Michigan law, the amount involved would in nowise affect either the security structure or the cash position of the Chesapeake & Ohio.

The Chesapeake & Ohio is capitalized at $191,433,919. An additional $28,949,745 of stock is to be issued, under the merger plan, for Pere Marquette shareholders, making a total capitalization for the Chesapeake & Ohio, after merger, of $220,383,595. The appellants own 2,100 shares of Pere Marquette cumulative preferred. The merger agreement offered them securities found by the Commission to be worth $111.60 per share, or $234,360. If their claim for full book value of $172.50 per share were honored, it would amount to $362,250. This contingent liability of $127,890, the Commission concluded, did not

affect its finding as to the soundness, from the point of view of the "public interest," of the financial structure devised and approved for this merger. The Commission further pointed out that even if 2% of each class of Pere Marquette stock—the maximum number contemplated by the agreement—were to refuse to participate, the difference between the value of the Chesapeake & Ohio shares offered to them and the book value of their Pere Marquette shares could, if required, readily be absorbed by a soundly based quarter-billion-dollar carrier.

Both the Chesapeake & Ohio and the Interstate Commerce Commission here urge this view of the law. The Court, however, reads the Commission's duty under the Act quite differently, although in reaching its conclusion the Commission applied its settled administrative practice.

I think that the Commission was right in the view it took of its powers and duties. Even if the matter were doubtful, the Court does not seem to me to give to the Commission's construction of the Act the weight to be accorded its experienced judgment, which we held in *United States* v. *American Trucking Associations*, 310 U. S. 534, 549, to be required. Since the Commission disclaims rather than asserts a power, there is all the more reason to feel assured of its disinterestedness and to resolve ambiguity in favor of its choice of construction.

Until the Transportation Act of 1920, carriers, while subject to the Sherman law, could combine without leave of the Interstate Commerce Commission. See *Northern Securities Co.* v. *United States*, 193 U. S. 197. The Transportation Act of 1920 required the authorization of the Commission for acquisition by one carrier of the control over another, to the extent defined by § 5 of the Interstate Commerce Act, as amended. By the Transportation Act of 1940, the voluntary merger of the properties of two or more carriers into one corporation was

sanctioned, subject, however, to the scrutiny of the Interstate Commerce Commission for the due protection of the "public interest." Congress defined with particularity the factors that constituted the "public interest" put into the Commission's keeping.

The Court now holds that State law governing the relations between State-chartered carriers and their stockholders is impliedly supplanted as to those who have refused to assent to a merger, even when the Commission finds that to leave the adjudication of those rights to the law that created them in nowise touches the "public interest" that is the sole condition to carrying out a wholly voluntary arrangement, and even though such a voluntary arrangement by itself could not affect the rights of dissenters. I have no doubt that Congress could compel the unification of railroad properties theretofore in separate ownership and in so doing override State-created legal rights of stockholders of the constituent carriers. In the case of financially embarrassed carriers, Congress, in the exercise of its bankruptcy powers, has empowered the Interstate Commerce Commission to formulate plans of reorganization, the terms of which, if fair and equitable, may override State-created legal rights of stockholders who do not assent. In the interests of a more efficient national railroad system, Congress may accomplish like results under the Commerce Clause. But that is precisely what Congress has refused to do. It was besought to eliminate the waste and inefficiencies due to the congeries of corporate instrumentalities through which the railroads of the United States operate, by providing for compulsory consolidations. It was also besought to do away with the complexities and confusion resulting from State corporations conducting the country's interstate railroad business, by requiring federal incorporation. Congress rejected both demands. See H. R. Rep. No. 650, 66th Cong., 2d Sess., pp. 63–64. It

left mergers of separate railroad properties into larger units to the will of their private owners, merely lodging a veto power in the Commission if such voluntary mergers run counter to the defined public interest. And Congress explicitly negatived the possibility of construing such supervision by the Commission as the creation, "directly or indirectly, of a federal corporation."

The Commission was charged with seeing to it that the very limited requirements of § 5 (2) were observed, and to that end was given "exclusive and plenary" authority. § 5 (11). The purpose was to authorize a voluntary arrangement, to sanction an agreement, not to formulate a plan and to coerce its adoption, as is true of § 77. The law specifically enumerates the requirements that constitute the "public interest" which the voluntary agreement must satisfy to secure the Commission's approval. These are: the effect of the proposal on the public transportation service; the effect of including or failing to include other railroads in the plan; the resulting fixed charges; and the interest of the carrier employees affected. These factors have no bearing on whether the appellants' claim should be allowed. The great difference between these requirements and the detailed and comprehensive provisions of § 77, 11 U. S. C. § 205, carries a sharp legal contrast between the authorization which Congress required for voluntary mergers and the coercion of an imposed plan of reorganization in the case of insolvent roads.

Appropriate accommodation between federal and State interests in the construction of the Interstate Commerce Act is needlessly sacrificed by adding, to the detailed provisions whereby the Commission is merely authorized to approve voluntary mergers, an implied abrogation of State law in no respect inconsistent with such limited power of authorization, since the Commission found that survival of a claim under State law would not impinge

upon "the public interest." It ignores the salutory principle of construction, so strikingly illustrated by the *Los Angeles Terminal Cases* from which it was drawn, "that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly interpreted is in conflict with the law of the State." *Atchison, Topeka & Santa Fe R. Co.* v. *Railroad Commission*, 283 U. S. 380, 392–93. See also *Palmer* v. *Massachusetts*, 308 U. S. 79.

Since it is needless, it is undesirable to draw an implication so destructive of State law from the Congressional scheme for allowing voluntary mergers. In fact, Congress has manifested not an intention to abrogate State law where the Commission finds no collision with the public interest; it has manifested an intention not to abrogate State law unless it interferes with carrying out an approved merger. Thus, it made the necessary proportion of assenting stockholders dependent on State law. It hardly seems congruous to provide that State law should determine when the opposition of stockholders may prevent a voluntary merger, but should have no effect on the rights which such dissenters have under State law, even where the Interstate Commerce Commission finds no national interest involved in determining and enforcing such rights. Again, while § 5 (11) relieves parties to an approved merger from the restraints of other laws, "Federal, State, or municipal," it does so only "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . . ." This paragraph further contains an expressed disclaimer of authorization of federal incorporation. The prohibition of federal incorporation surely im-

plied a desire to retain to the fullest possible extent the ties between the States and their chartered corporations. One of the vital consequences of incorporation in a given State is the subjection of the relationship between stockholders and their corporation to the law of that State except insofar as federal law unmistakably overrides it.

The considerations relevant to voluntary railroad mergers sharply differ from those that control liquidations and reorganizations under § 77 of the Bankruptcy Act. (See also Railroad Reorganization Act, Pub. L. No. 478, 80th Cong., 2d Sess., April 9, 1948.) A railroad in reorganization is administered by a bankruptcy court which has control of all its assets. The power of dealing with all claims is inevitably concentrated in that court. In merger proceedings, however, there is no obstacle to the practice pursued by the Commission of deciding what is "just and reasonable" and in "the public interest" as to each class of securities, while at the same time permitting any dissenter to stand on the terms of the particular stock issue, leaving to State law to determine what those terms are, provided only that the function of the new corporation, as part of an economic and efficient national railroad system, would not be affected by allowance of such claims. The Commission has here ruled that the appellants assert an unliquidated claim against the Pere Marquette sufficiently negligible not to affect the financial position of its successor, even if it be ultimately allowed in full. I fail to see that the effect on the Chesapeake & Ohio will be any different than that of negligence claims for the same amount. Every operating railroad is likely to have such claims outstanding against it at all times. Their existence does not interfere with the consummation of a voluntary merger. A reasonable amount of contingent obligations may easily be allowed for. In any event, the determination whether or not eventual liability for contingent

claims of dissenting stockholders are such as to affect "the public interest" required to be protected by authorization of a proposed merger is precisely the function of the Interstate Commerce Commission and should appropriately be left to the exercise of its informed discretion.

The Commission has control, under § 20a, over securities, which of course it does not have over a contingent demand for compensation for loss resulting from negligence. But differences in the foundation of contingent claims do not determine their relevance to the Commission's authority in approving a merger and in leaving the determination of such claims to State law. While the rights asserted by the appellants arise out of their holding of securities, they may be paid off in cash, if their claims turn out to be well founded, and need not be satisfied out of the securities of the successor corporation.

Neither what Congress has written, nor what it has implied by the purpose underlying what it has written, persuades me that a power which the Commission itself has vigorously disclaimed it must now exercise. The Commission has consistently declined to adjudicate as a matter of State law—or what is now found to be federal law—contested claims not deemed relevant to its determination of "the public interest." *E. g., Sullivan-Purchase-Service Freight Line, Inc.*, 38 M. C. C. 621; *Jessup-Control-Safeway Trails, Inc.*, 39 M. C. C. 233, 241; *Lee-Control; Carolina M. Exp. Lines, Inc.—Lease and Purchase—Reed*, 40 M. C. C. 405, 407. See also *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 26–27; *Cleveland, Cincinnati, Chicago & St. Louis R. Co.* v. *United States*, 275 U. S. 404, 414.

The Court is holding, in essence, that while State law governs the rights of railroad stockholders before and after voluntary merger proceedings it is supplanted during such proceedings. In thus thrusting upon the Commission a

jurisdiction which it itself has rejected, the Court is depriving the States of a measure of control over their own corporations when this is not required by a fair reading of the Transportation Act, and although the survival of such State law does not interfere with the national interest as found by the agency selected by Congress for determining that interest.

I would affirm the judgment.

THE CHIEF JUSTICE and MR. JUSTICE BURTON join in this dissent.